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No. 91-964

Supreme Court, U.S.

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In the  
Supreme Court of the United States.

October Term, 1991

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STEPHEN DOHERTY,  
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,  
Respondent

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME JUDICIAL COURT  
OF MASSACHUSETTS

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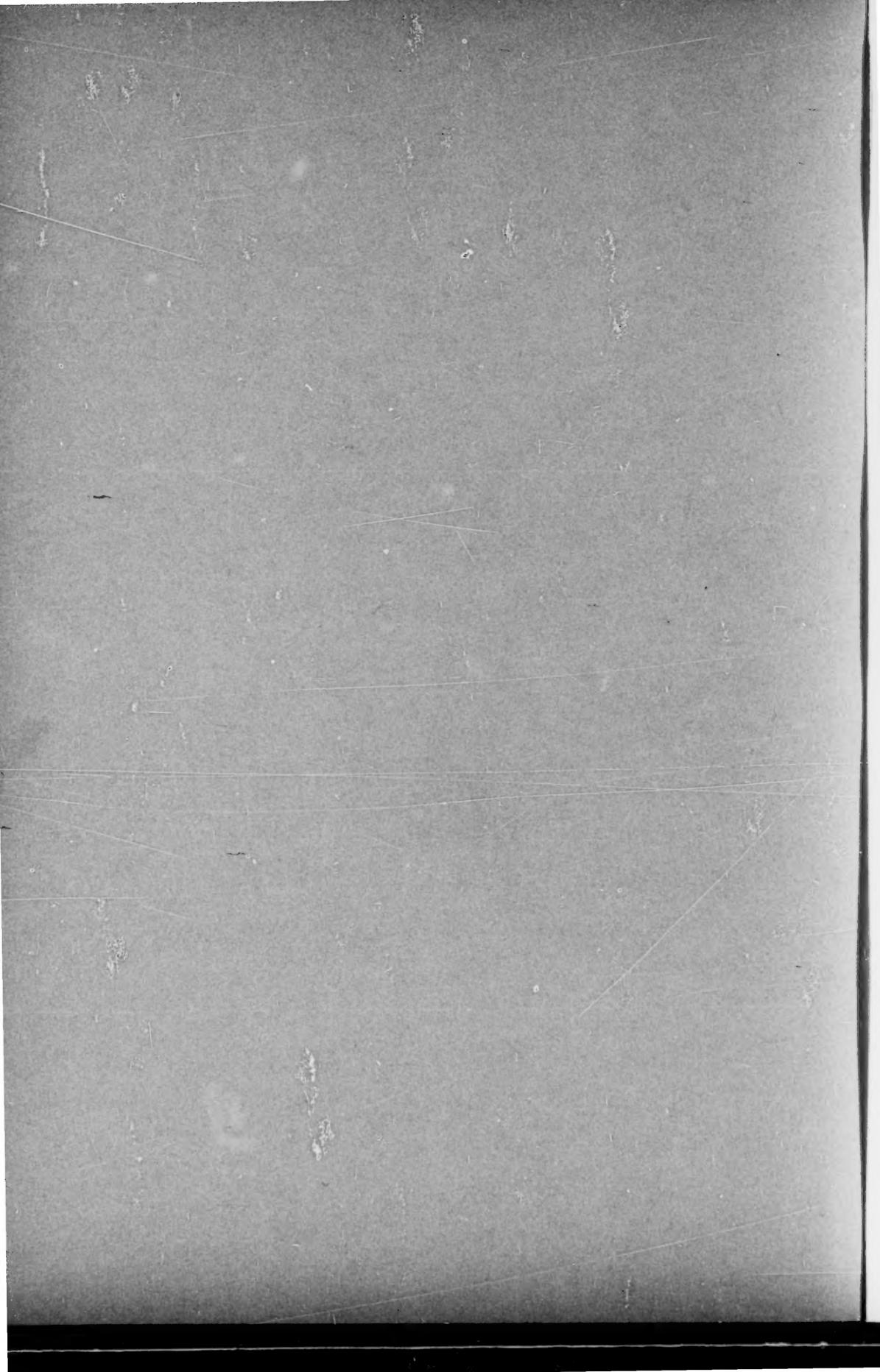
RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should grant certiorari to determine whether the petitioner's due process rights were violated by an allegedly improper "presumption" instruction where the Supreme Judicial Court of Massachusetts found that the jury instruction was ambiguous and that in any event it was harmless error under the standard set forth in Yates v. Evatt, 111 S. Ct. 1884 (1991).



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The respondent Commonwealth of Massachusetts respectfully requests that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts affirming the petitioner's conviction, and the convictions of two co-defendants, is Commonwealth v. Campbell, 378 Mass. 680, 393 N.E.2d 820 (1979), and the opinion at issue here, affirming the denial of petitioner's motion for new trial, is Commonwealth v. Doherty, 411 Mass. 95, 578 N.E.2d 411 (1991).

STATEMENT OF THE CASE

The petitioner Doherty, his two co-defendants Keigney and Campbell, and the victim Perrotta were inmates at the Massachusetts Correctional Institution at Walpole. On November 25, 1976, the petitioner Doherty acted as a lookout while the defendants Keigney and Campbell murdered the victim in his cell

by strangulating him after tearing his penis from his body and inserting it into his mouth. (App. A-8, A-9).

Shortly after 4:45 p.m. on that date, another inmate, Carden, met the petitioner on the third tier landing, and petitioner prevented Carden from going to Perrotta's cell. When the door to Perrotta's cell opened, and Perrotta, Keigney, and Campbell walked out, petitioner allowed Carden to proceed to Perrotta's cell. (App. A-4, A-68). When Carden spoke to Perrotta at that point, Perrotta appeared very nervous. (App. A-4, A-5).

Later, Carden returned to the cell block in which Perrotta's cell was located, and saw petitioner leaning over the rail in front of Perrotta's cell. Carden proceeded up the stairs, then saw petitioner walking toward the rear of

the cellblock as Keigney and Campbell left Perrotta's cell at a fast pace. (App. A-6, A-68). No one else was present on that level. Carden then entered Perrotta's cell and discovered his dead body. (App. A-6).

The petitioner, Keigney and Campbell were jointly tried and all convicted of first degree murder. Their convictions were affirmed by the Supreme Judicial Court of Massachusetts on August 7, 1979. (App. A-1, A-65). After unsuccessfully seeking post conviction relief three times in state court and once, in 1988, in federal court, petitioner filed his fourth motion for new trial in March, 1989, raising for the first time a claim of a Sandstrom v. Montana, 442 U.S. 510 (1979), violation in the context of Francis v. Franklin, 471 U.S. 307 (1985). (App. A-66). A judge of the Superior Court denied that

motion because it presented "no issue which has not already been adjudicated." (App. A-62, A-66).

A Single Justice of the Supreme Judicial Court permitted the petitioner to appeal to that court the rejection of his contention that the jury charge contained constitutionally infirm language concerning presumptions of malice and intent. (App. A-67). The court affirmed the denial of petitioner's fourth motion for new trial on September 12, 1991, holding that the petitioner had not waived or otherwise lost his right to a determination on the merits of his claim, but that there was no constitutional error in the instructions. (App. A-67). In the context of the instructions that were given, and because there was no evidence justifying a manslaughter verdict or

raising a question whether the killing was excused or justified, there was no Sandstrom error in the language concerning a presumption of malice in certain circumstances. (App. A-73-76). The court also concluded there was no constitutional violation in instructions mentioning presumed intent. Without specifically deciding whether that part of the charge created an impermissible presumption, the court found that any error would be "immaterial and harmless in all respects" concerning petitioner. (App. A-81).

Petitioner seeks certiorari solely on his claim concerning the presumed intent language of the instructions.

REASONS FOR DENYING THE WRIT

THIS CASE IS INAPPROPRIATE FOR REVIEW BY THIS COURT BECAUSE THE DECISION IN ESTELLE V. McGUIRE IS CONTROLLING, AND BECAUSE THE COURT BELOW PROPERLY FOUND THAT THE INSTRUCTION AT ISSUE WAS HARMLESS.

The petitioner asks this Court to grant certiorari because he claims the Supreme Judicial Court of Massachusetts erroneously applied the standard for harmless error analysis set forth in Yates v. Evatt, 111 S. Ct. 1884 (1991). In effect, petitioner is asking this Court to establish a rule that if a "presumed intent" instruction is given, and intent is an issue in the case, the instruction can never be found to be harmless. Certiorari is inappropriate not only for the ground stated, but for other reasons as well.<sup>1/</sup>

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1/ Because the Supreme Judicial Court addressed the petitioner's claim, there (footnote continued)

The petitioner's argument ignores the Yates decision, upon which he purports to rely, in which this Court held that even where the reviewing court finds that a presumed intent instruction is constitutionally erroneous, harmless error analysis is appropriate. See id. at 1892-1893. The Supreme Judicial Court fully considered the issue of whether the instruction was harmless under the standard set forth in Yates, assessing what evidence the jury was

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(footnote continued)

may be no absolute jurisdictional bar to certiorari. Banker's Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 79 (1988). However, petitioner's failure to raise the issue in any of his previous post trial motions should factor into the certiorari decision. The Commonwealth argued below that petitioner had waived his right to challenge the instructions at this juncture and already had appellate review of his challenge. (App. A-69).

warranted in considering based on the instructions, and weighing the probative force of the evidence against the presumption standing alone. Id. at 1893.

As the Supreme Judicial Court found, the judge properly defined malice in his charge, and there was "powerful proof of malice in the killing." The malice of the principals was not disputed at trial. (App. A-77-A-79, A-81).

Contrast Francis v. Franklin, 471 U.S. 307, 325-326 (1985) (facts did not overwhelmingly preclude absence of intent to kill). The Commonwealth did not claim that the petitioner committed the killing. The evidence established that the petitioner did nothing to the victim that would lead the jury, given the challenged instruction, to presume any contested fact of the Commonwealth's case against the petitioner. (App.

A-81-A-82, A-83). The contested issue concerning the petitioner was whether as a joint venturer he shared the same intent as the co-defendants Campbell and Keigney, but the challenged jury instruction had nothing to do with that issue. (App. A-82). Moreover, the jury was properly charged on joint venture. (App. A-84).

In light of these factors, the Supreme Judicial Court properly found that the instruction as it applied to the case against petitioner was ambiguous, and not clearly erroneous. (App. A-79, A-84, A-85). See Estelle v. McGuire, 60 U.S.L.W. 4015, 4018 (Dec. 4, 1991). Although the instruction contained presumption language, immediately before the sentence where presumption was mentioned, the judge instructed the jury that the jury could

"infer[] from that killing and from the acts of the participants what their intent was." (App. A-76-77).

In all of the cases relied upon by the petitioner, the defendant was the principal in the crime, and not a lookout like petitioner. See Francis v. Franklin, 471 U.S. at 310-311 (Franklin admitted shooting the victim but denied he did so intentionally); Sandstrom v. Montana, 442 U.S. 510, 512 (1979) (Sandstrom confessed to slaying, but denied killing "purposely and knowingly"); Yates v. Evatt, 111 S.Ct. 1884, 1888-1889 (1991) (Yates shot victim during robbery, admitted he brought weapon into store, but denied he intended to kill anyone). As the Supreme Judicial Court recognized, the effect of the challenged instruction on the jury's consideration of the issues

relevant to the petitioner's guilt or innocence as a lookout would not be the same as in a case like those relied upon by the petitioner where the defendant was the principal and denied that the killing was intentional. (App. A-77-79, A-81-85). Therefore, the Supreme Judicial Court properly concluded that in the case against petitioner the challenged instruction was "immaterial and harmless in all respects." (App. A-81).

Similarly, the petitioner's argument that the Supreme Judicial Court applied the incorrect standard because in reviewing an erroneous presumption instruction, the reviewing court must accept the view that the jury considered the offending instruction, Petition at 18, ignores this Court's recent decision in Estelle v. McGuire, 60 U.S.L.W. 4015

(Dec. 4, 1991). In McGuire, this Court specifically rejected the conclusion in Yates relied upon by the petitioner and held that in reviewing an ambiguous instruction, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the constitution. Id. at 4018 & n.4. Under the standard set forth in McGuire, the instruction is to be considered in the context of the instructions as a whole as well as the trial record. Id. at 4018.

It was unnecessary for the Supreme Judicial Court to specifically decide whether the challenged instruction violated the petitioner's due process rights, since the court found that the "arguably flawed instruction" was harmless. Although the McGuire case was decided by this Court after the Supreme

Judicial Court's decision in the petitioner's case, the analysis conducted by the Supreme Judicial Court in effect applied the McGuire standard, demonstrating that there was no reasonable likelihood the jury applied the instruction in a way that violated the petitioner's due process rights.

#### CONCLUSION

For all the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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